PUBLIC PROSECUTOR

v.

MOHD. ISMAIL MOHD. SULTAN

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL TRIAL NO. 6 OF 1982]
18 APRIL 1983

CRIMINAL LAW AND PROCEDURE: *Dangerous drugs - Accused found guilty of trafficking - Cannabis - Section 39B(2) of Dangerous Drugs Act 1952 (Revised 1980) amended to provide mandatory death sentence upon conviction - Amendment came into force the day accused was found guilty - What was the material date for determining sentence - Whether date of offence or date of conviction - Whether amendment affected Court's discretion to impose a sentence of life imprisonment.*

The accused was charged for an offence of trafficking in a dangerous drug, to wit, cannabis, in contravention of s. 39B(1) of the Dangerous Drugs Act, 1952 (Rev. 1980) and found guilty of the said offence on 15 April 1983 by the High Court Penang after a trial. However, on the day when the accused was found guilty, s. 39B(2) was amended, thereby removing the Judge's discretion, to impose a sentence of life imprisonment with whipping as opposed to death which provision was deleted by s. 14 of Dangerous Drugs (Amendment) Act, 1983, which provides for the mandatory death sentence upon conviction in all cases of trafficking in contravention of s. 39B(1) of the Act. As a result, the point of law in question was what was the material date for determining sentence for such offences - was it the date of the offence or the date of the conviction?

Held:

[1] It was clear beyond peradventure that the amendment to s. 39B(2) of the Dangerous Drugs Act (Revised 1980) which provides for the mandatory death sentence upon conviction in all cases of trafficking in contravention of s. 39B(1) of the Act was enacted after the commission of the offence and, so far as cases such as this were concerned, plainly violates Article 7(1) of the Federal Constitution.

[2] The amendment to s. 39B(2) of the Dangerous Drugs Act 1952 (Rev. 1980) assuming it operates retrospectively, was clearly a law which came within the striking range of Article 7(1) of the Federal Constitution and accordingly it is invalidated so far as cases where the offence was committed prior to the date of its coming into force were concerned.

[3] Therefore, the Court had the discretion in the matter of sentence, since s. 39B(2) of the Dangerous Drugs Act (Revised 1980) prior to the amendment was what applied.

[Order accordingly.]

N.B.: *(Accused was sentenced to life imprisonment and ordered to be given six strokes on 18 April 1983)*

Case referred to:
Baker & Anor. v. The Queen [1975] 3 All ER 55

Legislation referred to:
Dangerous Drugs Act 1952, ss. 39B(1), (2)
Dangerous Drugs (Amendment) Act 1983, s. 14
Federal Constitution, art. 7(1)

Juveniles Law [Jamaica], s. 29(1)
Offences against the Person Law [Jamaica], ss. 2, 3

For the public prosecutor - Nordin bin Haji Sulaiman, DPP
For the accused - R. Rajasingam; M/s. R. Rajasingam & Co.

JUDGMENT

Edgar Joseph Jr J:

On the effect of the amendment to s. 39B(2) of the Dangerous Drugs Act 1952 (Rev. 1980) by the Dangerous Drugs (Amendment) Act 1983, which came into force on 15 April 1983

When on Friday last, that is to say, on 15 April 1983, after a somewhat lengthy trial, I found this accused guilty of trafficking in a dangerous drug, to wit, cannabis, in contravention of s. 39B(1) of the **Dangerous Drugs Act 1952** (Rev. 1980) ("the Act"), I invited the prosecution and the defence to address me on the question, whether as a matter of law, I had any discretion, to impose a sentence of life imprisonment with perhaps whipping as opposed to death. I raised this question because, until the day before the subsection which provided for penalties for the offence of trafficking in a dangerous drug being s. 39B(2) ("the subsection") clearly gave me such a discretion as it was in the following terms:

> Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Ordinance and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping.

On the very next day, however, that is to say, on the day when I found the accused guilty, the subsection underwent a drastic amendment, namely, the words "or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping" were deleted by s. 14 of the Dangerous Drugs (Amendment) Act 1983, thus providing for the mandatory death sentence upon conviction in all cases of trafficking in contravention of s. 39B(1) of the Act.

Upon these facts, the short point of law involved appeared to be, "what is the material date for determining sentence for such offences, is it the date of the offence or the date of the conviction?" The question is as simple as that; an interval of time, in the context of legal history, as fine as a hair, but, at first sight, as deep as a grave.

I now turn to consider the provisions of the subsection in the form it now takes.

Clearly, the subsection deals not with criminal liability but with the penalty which must be inflicted once such liability is established following trial or, alternatively, once the accused pleads guilty to the charge concerned. It is at that moment, that is, the moment of conviction, that the subsection is activated.

I therefore take the view that purely as a matter of construction, and considered by itself, the subsection in the form it now takes is open to only one reasonable construction, namely, that it is the date of conviction which is the relevant date for purposes of sentencing.

I am fortified in this view by a passage in the Judgment of Lord Diplock, delivering the majority opinion in the Jamaican Privy Council case of *Baker & Anor. v. The Queen* [1975] 3 All ER 55, 57 para. j to 58 para. a. In that case, the appellants were both 17½ at the date of offence, but over 18 at the date of conviction for murder. Sections 2 and 3 of the **Offences against the Person Law** provided that the death sentence is mandatory on conviction. But s. 29(1) of the **Juveniles Law** of Jamaica provided that:

> Sentence of death shall not be pronounced on or recorded against a person under the age of eighteen years, but in place thereof the Court shall sentence him to be detained during Her Majesty's pleasure ...

Nevertheless, Parnell, J took the view that the material date for purposes of sentencing was the date of conviction and sentenced the appellants to death. This view was shared by the majority of the Court of Appeal from whose decision the appellants appealed to the Judicial Committee of the Privy Council. Before their Lordships of the Board, it was common ground that the result of the appeal turned on the true construction of s. 29(1) of the Juveniles Law and on this issue Lord Diplock said this:

> Considered in isolation the words of each of these subsections, in their Lordships' view, are not capable as a matter of language of bearing the meaning that the date for ascertaining the age of a person for the purposes of either of the subsections is that of commission of the offence. The subsections are not dealing with criminal responsibility, the age of which is fixed at eight years of age by s. 3 of the Juveniles Law. They are dealing only with the sentencing of persons whose criminal responsibility has been established at a trial. The person referred to in sub-section (1) and the 'juvenile' referred to in sub-section (2) is a person who has already been convicted of an offence and on whom sentence is about to be pronounced. Until that moment he does not fall within either subsection at all. So this must be the time at which he must be under the specified age in order to be entitled to the benefit of either subsection.

That, however, is not the end of the matter because Article 7(1) of our Constitution provides as follows:

> No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

Now, it is clear beyond peradventure that the subsection in the form it now takes was enacted after the commission of the offence and, so far as cases such as this are concerned plainly violates Article 7(1). Once again, I am fortified in this view by another passage in the judgment of Lord Diplock in *Baker's* case (*supra*) which reads as follows:

> Their Lordships turn next to consider the effect on s. 29 of the Juveniles Law of two provisions of the Constitution of Jamaica contained in ss. 20(7) and 26(8). This is the only matter on which there is any conflict of authority.
>
> Both provisions form part of Ch 3 'Fundamental Rights and Freedoms'. They are as follows.
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> Section 20(7):
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> > No person shall be held to be guilty of a criminal offence on account of any act or omission which did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence **at the time when it was committed**.
>
> Section 26(8):
>
> > Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.
>
> Their Lordships will first express their own opinion as to the effect of these two provisions without recourse to the previous authorities.

Even if s. 20(7) were considered in isolation, their Lordships do not consider that s. 29 of the Juveniles Law would be inconsistent with its provisions. So far as they relate to penalties for criminal offences, they are directed to invalidating laws **passed after an offence has been committed** which increase retrospectively the penalty that may be imposed for that offence.

(Emphasis supplied)

The subsection, assuming it operates retrospectively, is clearly a law which comes within the striking range of Article 7(1) and I would accordingly hold that it is invalidated so far as cases where the offence was committed prior to the date of its coming into force are concerned. It follows, therefore, that I have a discretion here in the matter of sentence, since the subsection in the form it took prior to the amendment is what applies.

I am now prepared to hear any further submissions as to how that discretion should be exercised regard being had to the circumstances of this case.

Also found at [1983] 1 CLJ 319